



# California Environmental Protection Agency

**Unified Program Bulletin**  
0405-03

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**TO:** All Certified Unified Program Agencies  
**FROM:** Unified Program Section  
**SUBJECT:** Federal Facility Fee Payment Guide

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## Introduction

Some federal facilities have a history of refusing to pay state and local fees based on a legal doctrine called sovereign immunity. Derived from the English concept that the sovereign can do no wrong, the federal government claims that "there can be no legal right against the authority that makes the law on which the right depends." 205 U.S. 349, 353. The federal government thus refuses to be subject to state taxes, regulations, and the institution of civil suits against itself unless it has provided express consent. This consent must be enacted by Congress in federal statute to "waive sovereign immunity" in a given arena.

Both RCRA and the Clean Air Act contain express waivers of sovereign immunity pertaining to federal violation of state laws and regulations. This means that federal facilities are legally obligated to pay all fees which find their authority in these pieces of federal legislation. Please see the Table below for details.

Despite a lack of express waiver, federal facilities are also accountable for other CUPA single fee elements, as well as for the State Surcharge, under the case precedent of *United States v. Maine* and *Commonwealth of Massachusetts v. United States*. These decisions combine to establish federal responsibility for reasonable user fees which are defined, limited, and distinguished from taxes under the 3 pronged "Massachusetts test." The Massachusetts test thus mandates compliance with reasonable state and local "service charges," inclusive of CUPA fees.

The following table defines federal obligations based on waivers of sovereign immunity and the Massachusetts test. Where immunity is waived, federal facilities are required to pay the fees, penalties and or comply with the order.

### CUPA Fees and Options for Relief

Immunity waived for:

<u>Program</u>	<u>Federal Authority</u>	<u>Corresponding California Law</u>		<u>CUPA Fees?</u>	<u>Injunctive Relief?</u>	<u>Civil Penalties?</u>
RCRA	42 USC §6961	HSC 25180		Yes	Yes	Yes
UST's	42 USC §6991f	HSC 25299		Yes	Yes	No
HMRRP (same for UFC)	EPCRA/executive order	HSC 25509		Yes*	No	No
RMP	Clean Air Act 42 USC §7418(a)	HSC 25531		Yes	Yes	Yes
State Surcharge	Massachusetts Test*	CCR Title 27 §15240		Yes*		

\*authority under the *Massachusetts* test for fees in the absence of an express waiver of sovereign immunity.

For more details, please see the following discussions of waivers of sovereign immunity and the Massachusetts test:

### Statutory Waivers

#### **Hazardous Waste Management (RCRA)**

- Authority: "Federal Facility Compliance Act of 1992," amending 42 U.S.C. § 6961 to waive immunity after *Dept. of Energy v. Ohio*.
  - Makes federal facilities "engaged in the management or disposal of solid waste or hazardous waste" subject to all state and local requirements, including, but not limited to, "all administrative orders and all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature or are imposed for isolated, intermittent, or continuing violations."
- This waives immunity for:
  - CUPA fees
  - Injunctions and Coercive Sanctions
  - Penalties

#### **Underground Storage Tanks (UST)**

- Authority: 42 U.S.C. §6991(f)
  - "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government having jurisdiction over any underground storage tank shall be subject to, and comply with, all

Federal, state, interstate, and local requirements, applicable to such tank, both substantive and procedural, in the same manner, and to the same extent, as any other person is subject to such requirements, including payment of reasonable service charges. Neither the US, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such injunctive relief.”

- Waives immunity for:
  - CUPA fees (reasonable service charges)
  - Injunctions and Coercive Sanctions

\* Does not waive immunity for penalties

#### **HMRRP/UFC**

- Authority: EPCRA (no waiver), Executive Order (only encourages compliance), possible weak analogy to RCRA.
  - There is no express waiver of sovereign immunity in the federal statutes governing HMRRP or UFC. There is an argument, however, that the RCRA waiver could be applied to HMRRP/UFC since it should be applicable to “any activity resulting, or which may result, in the disposal of hazardous waste.”
- If the RCRA waiver is allowed, immunity would be waived for CUPA fees, injunctions, and penalties. This analogy has not been tested in court.

#### **Air Pollution (RMP)**

- Authority: Clean Air Act (42 U.S.C. § 7418). See *Cal. Ex Rel. Sacramento Metro. Air Quality v. U.S.*, 215 F.3d 1005, 1010-1011 (9<sup>th</sup> cir. 2000); *U.S. v. Tennessee Air Pollution Control Board*, 185 F.3d 529 (6<sup>th</sup> Cir. 1999).
  - Waives sovereign immunity for violations of state and local air laws
  - Precludes removal to federal court when the action is based solely on state or local law. 42 U.S.C. § 7604(e).
- Waives immunity for:
  - Fees
  - Injunctions
  - Penalties

#### **Fees under the Massachusetts Test**

Regardless of the express waivers of sovereign immunity required for state taxes and regulations, federal agencies are always subject to reasonable user fees. *United States v. Maine* 524 F.Supp. 1056 (1982). These fees may be distinguished from taxes according to the three prong test made precedent in *Commonwealth of Massachusetts v. United States* 435 U.S. 444 (1978).

- Do the charges discriminate against the federal government?
- Are the charges a fair approximation of the value of the permits and other benefits received by the federal government from the state regulatory process?
- Do the charges produce revenue that does not exceed the cost to the state?

The federal entities should be liable for both the state surcharge and the HMRRP/UFC fees under the *Massachusetts* test. There is no discrimination against the government, and as statutorily defined, the valuation and revenues are appropriate.